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The increasing use of the automobile will undoubtedly give rise to cases involving the rights and liabilities of their owners and operators, but as yet precedents on the subject are rare. A decision by Judge Sunderland, of Rochester, New York, has recently been rendered in which the sensible conclusion is reached that all such methods of conveyance must stand upon the same footing as carriages of the older fashioned type, and that it is not to be expected that damages may be obtained every time that horses may take fright. If one should find it desirable, as the court very properly remarks, to go back to primitive methods, and tread along a city street with a four ox team and wagon of the prairie schooner variety, it would possibly cause some uneasiness in horses unused to such sights. Yet it could not be actionable if a runaway should result: provided due care were shown not unnecessarily to interfere with the use of the highway. Horses may take fright at conveyances that have become obsolete as well as at those which are novel, but this is one of the dangers incidental to the driving of horses, and the fact cannot be interposed as a barrier to retrogression or progress in the method of locomotion. Bicycles used to frighten horses, but no right of action accrued. Electric street cars have caused many runaways. Automobiles operated without steam by storage batteries or by gasoline explosion engines, running at a moderate speed, may cause fright to horses unused to them, yet the horse must get used to them or the driver takes his chances. If the horse is to keep up with the procession, he must get accustomed to the automobile, and not "shy" when it appears on the public highway.

A somewhat contrary view was taken by Mr. Justice Dixon of New Jersey, in the case of *Guyre v. Vroom*. There the plaintiff sued for damages for the loss of his wife. Witnesses testified that defendant's automobile being beyond his control, backed nearly into

the horse driven by plaintiff's wife, causing the animal to run away and throw her out. Defendant's testimony was that the horse was frightened and turned when two hundred and seventy-five feet away from the automobile, which he stopped upon seeing that the animal was afraid. He said that he had the machine under perfect control and gave an exhibition in front of the court house to show the court and jury his ability to handle it. Justice Dixon said to the jury: "The first question to which you come for the purpose of deciding the defendant's responsibility is whether this machine was a nuisance. You have seen how it was operated. You have heard the witness describe the mode of operation, and the question rests with your sound judgment as to whether the machine, driving along country roads without a horse in front and discharging steam behind, is likely to frighten a horse on the highway and thus endanger the road so as to constitute the machine a nuisance. It is agreed that it is an improved method of locomotion, but it does not follow from that that it is to be tolerated. The right to drive horses along the highway is an established right, a common right, and if a modern method of locomotion is used of such a nature that it commonly brings discomfort and danger to those exercising the common right, the established right of travel on the highway, then it is a nuisance and cannot be tolerated. If it occasionally or exceptionally frightens horses that would not make it a nuisance. In order to make it a nuisance its common effect must substantially interfere with the people who drive horses along the highway." After being out a few minutes the jury returned for further instructions on one point, at the same time informing the court that it had agreed that the automobile was not a nuisance. The jury were out all night, disagreed and were discharged.

In a recent criminal case before the Supreme Court of Ohio—*Davis v. State*—it appeared that the trial court was requested to charge the jury that each juror must be convinced beyond a reasonable doubt of the guilt of the defendants before uniting in a verdict of guilty. This the court refused, but did charge that the jury must be convinced beyond a reasonable doubt before

finding the defendants guilty. The supreme court held that this request was properly refused and indorsed the instruction as given. The request, as asked, says the court would seem to invite an acquittal, or at least a disagreement, and was therefore misleading. It is true that each juror must be convinced of the guilt of the defendant before uniting in a verdict against him, and this is generally understood; but it is equally true that each should confer with his fellows and listen to what they have to urge in weighing the evidence, whether it be for or against an acquittal, and not obstinately stand upon his own opinion in the matter. The request asked and refused by the court would tend to such a result, and was therefore properly refused. *State v. Hamilton*, 57 Iowa, 596, 11 N. W. Rep. 5; *State v. Robinson*, 12 Wash. 491, 41 Pac. Rep. 884; *State v. Young*, 105 Mo. 634, 640, 16 S. W. Rep. 408. The verdict should be the intelligent consensus of the whole jury, arrived at upon the evidence beyond reasonable doubt. It should be addressed as an entity, and not as separate individuals. If the accused is in doubt as to whether the verdict is that of each juror, his remedy is to have it polled before it separates, which is an adequate protection against the probability that some one of them or more has not united in the rendition of the verdict.

#### NOTES OF IMPORTANT DECISIONS.

**CONTRACT — RESTRAINT OF TRADE.**—While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser, and will uphold them, it does not treat them with any special indulgence. They are intended to secure the purchaser of the good will of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished, it will not be presumed that more was intended." 2 Beach, Cont. sec. 1575. And to the same effect is the declaration of the Supreme Court of Illinois in *More v. Bennett*, 140 Ill. 69, 80, 29 N. E. Rep. 891, 15 L. R. A. 364: "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased;" and

this language is quoted approvingly by the Supreme Court of Pennsylvania. *Nester v. Brewing Co.*, 161 Pa. St. 473, 481, 29 Atl. Rep. 104, 24 L. R. A. 250. The Supreme Court of Iowa adopts the same view. *Chapin v. Brown* (Iowa), 48 N. W. Rep. 1074, 12 L. R. A. 428, and so have other courts, where this phase of the general question has been discussed. *Oliver v. Gilmore*, C. C., 52 Fed. Rep. 562.

The Supreme Court of Alabama in the recent case of *Tuscaloosa Ice Mfg. Co. v. Williams*, 28 South. Rep. 669, applies the same doctrine holding that where plaintiff and defendant, each of whom owned an ice plant in a city of 7,000 inhabitants, in which there were no other ice factories, entered into a contract whereby plaintiff, in consideration that defendant should pay him a certain sum annually, agreed not to run his ice plant nor suffer it to be run for five years, unless he should sell it, in which event he released the defendant from all subsequent payments, the contract was void as contrary to public policy, since it stifled competition and promoted a monopoly.

**RIGHT OF PRIVACY — ADVERTISING PHOTOGRAPH.**—The Supreme Court of New York has recently held in the case of *Roberson v. Rochester Folding Box Co.*, 65 N. Y. Supp. 1109, that a private person is entitled to have the likeness of her face concealed from the observation of the public, and that the display of the same by means of lithographs for advertising purposes and without her consent, is an invasion of her right of privacy, and also her right of property in the same. It was held that an injunction would lie to restrain the defendants from making use in any manner of the likeness of the plaintiff, and further, that damages could be recovered for injury to her reputation, and for mental and physical suffering caused thereby.

The right of property by a private person in his portraiture has been recognized for some time by the courts, which hold that the right is exclusive so long as the individual does not become a public character. *Mayall v. Higbey*, 1 Harl. & C. 148; *Corliss v. Walker Co.*, 57 Fed. Rep. 434. In the latter case Holt, J., says: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; that it belongs to the same class of rights, which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class." Every one has a natural right to, and dominion over, his own ideas and the product of his intellectual labor for the reason that they emanated from him, so it would not be illogical to hold that a private individual should have the right to say whether a thing so peculiarly his own as his face, should be publicly exploited or not. Although it would seem that an individual had a right not to be dragged before the public

and that the right of privacy ought to be recognized as a legal right, yet the stronger position is also stated by the court, that "If her lithographic likeness, owing to its beauty, is of great value as an advertising medium, it is a property right which belongs to her and cannot be taken from her without her consent."

**FEDERAL COURTS—JURISDICTION—MUNICIPAL CORPORATIONS—CONTRACT WITH WATER COMPANY.**—In *Los Angeles City Water Co. v. City of Los Angeles*, decided by the United States Circuit Court, S. D. California, 103 Fed. Rep. 711, it was held that a federal court had jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impairs the obligation of a contract between the city and the company, although the contract, as set out in the bill, expired by its terms prior to the passage of the ordinance, where it is alleged to be still in force.

It appeared that under a contract with a city to reconstruct its waterworks and operate the same for a term of thirty years, a water company during the term practically constructed an entirely new and greatly enlarged plant, increasing the distributing system from one having six miles of wooden pipes to one with 320 miles of iron pipes. The contract required the company to furnish water free for all municipal, fire and school purposes, and to supply the inhabitants of the city with water for domestic purposes at rates not exceeding those therein fixed, and for that purpose to make all reasonable extensions of its system. It further provided that at the end of the term the plant should be returned to the city, which should pay the value of all improvements made therein; the amount to be agreed upon or fixed by arbitrators. At the expiration of the term the city did not pay or tender the value of such improvements, which had not been agreed upon or satisfactorily determined; but it continued to require the company to make extensions, and to furnish water free for public uses, the same as before. It was held that so long as the company complied with such requirements, and until the city terminated the contract by making or tendering the required payment, its provisions for the benefit of the company remained in force, and the city could not, without unconstitutionally impairing its obligation, reduce the rates which the company was thereby authorized to charge for water supplied to private consumers.

It was further held that a water company is entitled to an injunction to restrain a city from enforcing an ordinance reducing its rates of charge in impairment of a contract, and subjecting the company and its officers and employees to penal actions for its violation, and also to restrain private persons from instituting threatening prosecutions under such ordinance.

## SOME ERRORS IN THE LAW OF FIXTURES.

The object of this article is to point out a few, of what seems to the writer, to be erroneous principles in the law of fixtures, if that may be said to be "in the law" which is found in the writings of standard text-writers, and in the *dictum* of many judicial decisions. We will first notice an erroneous definition of the term "fixture," which is liable to lead to misapprehension and confusion. I do not mean that the words I use in the following definition are the exact words used by any text-writer, but an accurate expression of their idea of the term, as the pages of their works disclose, and should be as follows: A fixture is an article of personal property which has been annexed to land, and thereby became part and parcel thereof, but removable against the will of the owner of the freehold. It seems that the idea intended to be conveyed by these writers is, that the article, in order to be a fixture, must be so annexed to the realty as to become a part and parcel thereof, *i. e.*, must become real estate after annexation.<sup>1</sup> The right of removal of articles annexed to the realty, is, by the writers who entertain this idea of the nature of fixtures, grounded not on the right of property, as it seems it should be, but on a mere "privilege conferred by the law of fixtures."<sup>2</sup> Mr. Ferard (who is one of the oldest, as well as the most classical writer on the law of fixtures, and to whom several other writers on this branch of the law are greatly indebted, but unhappily have incorporated in their own works some of his errors) reviews a number of cases supposed, by him, to support the doctrine that fixtures, *i. e.*, articles removable against the will of the owner of the freehold, are part and parcel of the realty until actually severed and removed, but it is submitted that these cases do not sustain the doctrine that fixtures are a part and parcel of the realty removable against the will of the owner of the freehold. We will now notice these cases with a view of showing that they do not sustain this doctrine, although in some of them, there will be found

<sup>1</sup> An examination of Ferard on Fix. 6, 9, and Ewell on Fix. 5, 6, 77, will, I think, show that I have not placed a wrong construction on what these authors have written upon this subject.

<sup>2</sup> Ferard on Fix. 7; Ewell on Fix. 77.

*dicta* to the effect that articles annexed by a tenant become part of the realty, though removable by the tenant, during his term, as against the will of the owner of the freehold. *Lee v. Risdon*<sup>3</sup> is often cited as an important case on this subject. It was an action of *assumpsit* for goods sold and delivered, wherein the plaintiff sought to recover the price of certain "fixtures," which the defendant, becoming tenant of his house, agreed to purchase of him at a valuation. It was held that the price of the "fixtures" could not be recovered under the declaration for goods sold and delivered. In this case the articles were annexed to the realty, as it seems, by the owner thereof, and were held to be part of the realty, and, of course, could not be sold and transferred as personalty. The articles were not fixtures at all according to the idea that fixtures are part of the realty, but removable against the will of the owner thereof. And *Hallen v. Runder*,<sup>4</sup> is often referred to in support of the same proposition; the facts of the case are as follows: A short time before the expiration of the lease of a house, the landlord agreed with the tenant to purchase his "fixtures" at a valuation. The lease expired and the tenant having quit possession of the premises without severing the "fixtures," it was held that the plaintiff having at the defendant's request waived his right to remove the articles, the matter bargained for was not an interest in land. So in this case the articles are expressly declared not to be an interest in the land, and therefore not fixtures at all, according to the idea which requires them to be a part of the realty. In *Minshall v. Loyd*<sup>5</sup> the question was as to the right to an engine, which right was founded on the supposed right of a tenant to remove it; but it was held that the tenant had no right to remove it, because he had relinquished or abandoned it, or because the engine was so annexed as to become a part of the realty. There was no doubt that the engine was left affixed to the freehold after the expiration of the tenant's term, and the court held trover could not be maintained for it. The engine was a part of the realty, but not being removable against the will of the owner of the

freehold was not a fixture according to the idea which requires fixtures to be part of the realty and removable. It has often been inferred from a remark made by Park, B., in this case that fixtures are a part of the realty until severed and removed. It was said that "the right of a tenant is only to remove during his term, the fixtures he may have put up, and to make them cease to be any longer fixtures, and this right of the tenant enables the sheriff to take them under a writ, for the benefit of the tenant's creditors." It cannot be inferred from the above expression, that so long as the things were affixed to the realty, and while the right of removal remained in the tenant, that the articles were considered as being real property, and not personal property. It is thought that the remark has reference merely to the time in which the right of removal must be exercised. And that it does not mean that the only right of the tenant to the things themselves is a right of removal during the term.

Another case which has been supposed to support this doctrine is *Raddin v. Arnold*.<sup>6</sup> The facts of the case are as follows: An engine placed by a tenant on solid masonry, to which it was affixed by iron bolts, and connected with a mill by pipes, belts, shafting and gearing, as well as a boiler, connected with the engine, and set upon solid masonry, but not affixed thereto except by its weight, and which could not be removed without tearing down brick work surrounding it, and also part of the building, were held not to be mere chattels for which trover would lie by one deriving his title, after condition broken from the person who sold them to the tenant by a conditional sale in the absence of evidence that the tenant placed them upon the premises without the consent of the vendor. In this case Grey, C. J., said: "Whatever might have been the right of removal, the engine and boiler, so long as they were affixed to the realty in the manner stated in the bill of exceptions, were not mere chattels, and therefore this action in the nature of trover will not lie for them." It is evident that these articles were not fixtures at all, in the sense of the definition which requires fixtures to be removable against the will of the owner of the land. The remark of the chief justice,

<sup>3</sup> 7 Taunt. 190.

<sup>4</sup> 1 C. M. & R. 275.

<sup>5</sup> 2 M. & W. 489.

<sup>6</sup> 116 Mass. 270.

"Whatever might have been the right of removal," etc., doubtless has reference to the forfeited right of the tenant.

There are a few other cases which have been often cited as supporting the proposition that fixtures are a part of the realty, though removable against the will of the owners of the freehold; among these are a number cited by Mr. Ewell.<sup>7</sup> But it is thought that all of these cases may consistently be construed as not supporting this most absurd doctrine, as it seems to the writer to be. On the other hand it has been expressly stated in many recent cases that things annexed to the freehold, and which are removable against the will of the owner of the realty are, to all intents and purposes, mere personal chattels.<sup>8</sup> The writers who consider fixtures as being part of the realty, though removable against the will of the owner of the freehold, attempt to establish a distinction between property which they term "fixtures" on the one hand and "mere movable chattels" on the other. There are but two kinds of things or property which are "things real" and "things personal" (I am not now speaking of the estates in things); the one in its nature, or contemplation of law, is immovable; the other movable. Therefore a thing is either a "mere personal chattel" or it is "a thing real," and it is removable or not according as it is found upon judicial inquiry to be the one or the other. So it is believed that any attempt to draw a distinction between "mere personal chattels" and an imaginary species of property which is not wholly "a thing real," nor wholly "a thing personal," can lead but to confusion.

We will now proceed to another error or misapprehension. It is an ancient maxim of the common law that whatever is affixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties.<sup>9</sup>

<sup>7</sup> Ewell on Fix. 77, and cases cited.

<sup>8</sup> *Handy v. Dinkerhoof*, 57 Cal. 3; *Tools v. Winton*, 63 Conn. 440; *Wattertown S. E. Co. v. Davis*, 5 Houst. (Del.) 192; *Walker v. Sherman*, 20 Wend. 636; *McKim v. Mason*, 3 Md. Ch. 186; *Wade v. Johnson*, 25 Ga. 331; *Hill v. Wentworth*, 28 Vt. 428; *Fullam v. Stearns*, 30 Vt. 443; *Swift v. Thompson*, 9 Conn. 63; *Scudder v. Anderson*, 54 Mich. 122; *Adams v. Lee*, 31 Mich. 440; *Robertson v. Corsett*, 39 Mich. 777; *Nigro v. Hatch*, 11 Pac. Rep. 177.

<sup>9</sup> *Ferard on Fix. 8*; *Ewell on Fix. 51*; *Broom's Leg.*

It is said that by the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold.<sup>10</sup> It has been said: "No doubt the maxim '*quicquid platur solo solo cedit*' is well established; the only question is, what is meant by it."<sup>11</sup> The error caused by the misapprehension of this maxim consists chiefly, in the attempt to establish nearly the whole law of fixtures upon exceptions to it. Whereas, the maxim is merely a simple statement of the change that has taken place in the nature of the property which has been affixed to the realty—that it has become a part of the realty and partakes of all its incidents and properties; but if it has not become a part of the realty, although it may be affixed to the realty, the maxim has no application. "To apply the maxim, there must be such a fixing to the soil as reasonably to lead to the inference that it—('the chattel')—was intended to be incorporated with the soil."<sup>12</sup> The misapprehension of this rule has been caused by the ambiguity of the term "affixed" or the term "annexed" which is often used in the expression of this rule or maxim, instead of the term "affixed" and with the same meaning. The terms do not mean that whatever is placed into mere contact with the realty is "affixed" or "annexed" to it; nor on the other hand, will the strongest and most substantial fastening or fixing necessarily render the article so fastened, "affixed" or "annexed" to the freehold within the meaning of these terms, as used in the maxim. But if a chattel which is placed in contact with the realty, becomes a part of the freehold, it is then, and not until then, in the sense of the term as used in the maxim of the common law, "affixed" to the realty. This view of the meaning of these terms may be somewhat supported by the language used in *Hill v. Sewald*,<sup>13</sup> which is as follows: "It is not the character of the physical connection with the realty, which constitutes the criterion of annexation, as the authorities hereinafter cited abundantly show;" and further on in the same opinion

Max. 401.

<sup>10</sup> *Teaff v. Hewitt*, 1 Ohio St. 511.

<sup>11</sup> *Lancaster v. Eve*, 5 J. Scott, C. B. R. 726.

<sup>12</sup> The quotation is from the opinion of Williams, J., in *Lancaster v. Eve*, 5 J. Scott, C. B. R. 726.

<sup>13</sup> 53 Pa. St. 271.

—“how, then, can it be said that a chattel is converted into realty when it was neither the intention of the owner of the chattel nor that of the owner of the freehold to annex it? If it be considered as annexed it must be purely on account of its physical attachment or because the mortgagee had acquired a lien upon it. The latter was not the fact, and the former we shall show is not the criterion of the law.” In this opinion the term “annexed” seems to be used in the same sense as in the maxim of the common law. But, generally, the term is used in the authorities as signifying that the chattel has been, in some degree, placed in contact with the realty, but does not signify that it is a part of the realty. If the writer’s contention be sound, as to the real meaning of this maxim, then it is clear that there can be no exceptions to the maxim, and the very serious error of attempting to establish nearly the whole law of fixtures upon supposed exceptions to a maxim or rule of law which has no exceptions is apparent.

A very common error arises out of this maxim or rather is an instance of it. It is the supposed general rule that “whenever a tenant has affixed anything to the demised premises during his term, he can never again sever it without the consent of the landlord; that the property by being annexed to the land immediately belongs to the freeholder; that the tenant by making it a part of the freehold is considered to have abandoned all future right to it, so that it would be waste in him to remove it afterwards; it therefore falls in with his term and comes to the reversioner as part of the land.”<sup>14</sup> When the term “annexed” is used, as it generally is used in the authorities, it may be said, consistently with them, that the general rule is to the contrary, *i. e.*, that whenever a tenant has made annexations to the freehold during his term, he may remove the same at any time during the continuance of the term. In *King v. Wilcomb*,<sup>15</sup> it is said: “The ancient rule that whatever was attached to the freehold by the tenant became a part of the freehold, and could not afterwards be removed by him, has gradually been relaxed in favor of the tenant, until now I understand the

general rule to be, that any one who has a temporary interest in land, and makes additions to it, or improvements upon it, for the purpose of the better use or enjoyment of it, while such temporary interest continues, may, at any time before his right of enjoyment expires, rightfully remove the additions and improvements. I think this may now be stated to be the general rule with respect to fixtures which a tenant attached to the freehold. There may be exceptions to the general rule I have stated. But I think they will be found limited to the cases where the removal of the additions or improvements made by the tenant, would operate to the prejudice of the inheritance, by leaving it in in a worse condition than when the tenant took possession.”

Another error, very generally entertained, is, that the right of the tenant to remove things, which he has annexed to the freehold during the continuance of his term must, in all cases, be exercised during the term and not after the expiration thereof.<sup>16</sup> But this rule has not an universal application; it cannot apply to things which in their nature, the manner and extent of their annexation, or by other circumstances, they could not be considered as having been intended to become a part of the realty; but those things only become a part of the freehold when a tenant abandons and leaves them annexed thereto, which would be deemed a part of the realty if annexed by the owner of the freehold, or in any other case where the presumption that things annexed by tenants were not intended to become a part of the realty, was absent. In other words, articles which are in some degree connected with or annexed to the realty, but which to the eye of the world are not considered as being a part of the realty, will not become a part thereof, merely because the tenant abandons or leaves them after the expiration of his term. This principle is correctly stated by Mr. Ferard in his work on *Fixtures*, and seems to be supported in *Holmes v. Tremper*,<sup>17</sup> and is certainly very strongly supported by reason. There are, perhaps, no cases which are really opposed to the distinction, but it seems to have been

<sup>14</sup> Ferard on *Fix.* 15; Ewell on *Fix.* 81; Broom’s *Leg. Max.* 416.

<sup>15</sup> 7 Barb. 268.

<sup>16</sup> Tiedeman on *Real Prop.* (2d Ed.) sec. 7, and cases cited; *Minshall v. Loyd*, 2 M. & W. 450.

<sup>17</sup> 20 Johns. 29.

very generally lost sight of.

We will conclude with a consideration of the construction which is placed upon the celebrated case of *Elwes v. Maw*.<sup>18</sup> Mr. Ewell in his work on Fixtures, says:<sup>19</sup> "Among those who concede the binding authority of *Elwes v. Maw*, there has hitherto existed some difference of opinion as to the exact scope of that case as an authority, some contending that the case is conclusive against the privilege of all agricultural tenants to remove any kind of fixtures erected on the farm during their term, and others construing the case somewhat strictly, and contending that the judgment has no reference to any other species of fixtures than those then under the consideration of the court, no reference to manufacture, or machinery, but were erected for mere agricultural purposes. The latter seems to be the more prevalent, and the better opinion; and it may probably be taken as a correct statement of the law, even where *Elwes v. Maw* is regarded as a binding authority on the question, that mere implements or articles of machinery, used as a means of facilitating the labor of the tenant not intended to be a permanent accession to the realty, and removable *integre salve et commode*, may be removed by the tenant for years during his term, even though erected for agricultural purposes." It seems, however, that the case of *Elwes v. Maw* is not, and ought not to be, considered as an authority against the removal of any kind of annexation, not even those made by a tenant for mere agricultural purposes. The case cannot reasonably be construed as going further than to lay down a rule that buildings, when annexed by a tenant for purposes of agriculture only, shall be deemed a part of the freehold, if from the manner and extent of the annexation, the nature of the buildings themselves, and other circumstances which may concur, it is evident that they were intended by the party who annexed them, at the time of their annexation, to become permanent accessions to the realty; and in determining this question of intention (actual or implied), the fact that the buildings were annexed for the purpose or con-

venience of agriculture shall be excluded as evidence, as not tending to show whether they were or were not intended to become a permanent accession to the freehold. Where things are annexed for purposes of trade the law generally deems this fact conclusive evidence that the thing annexed was not intended to become a permanent accession to the realty, and accordingly it follows that the tenant may remove such annexations as personal property. But if things are annexed to the realty for agricultural purposes only, can it be said that this fact is evidence that the thing annexed was intended as a permanent accession to the freehold, and, therefore, actually does become a part and parcel of the realty, not removable by the tenant. No such rule can be gathered from *Elwes v. Maw*. The case goes no further than to lay down a rule that the fact that buildings were annexed by a tenant for purposes of agriculture only, shall not be evidence that the building was not intended to become a permanent accession to the freehold, as it would be if the building had been annexed for purposes of trade. But after all, whatever be the rule which this case is thought to establish, the case itself hardly merits the very extensive discussion which may be found in the text books and reports with reference to it; especially is this true, in view of what seems to be the present state of the law in the United States at least, on this subject. Running through all the reports there will be found a seeming distinction between so-called "trade fixtures" and "agricultural fixtures" as to the right of a tenant who has annexed them, to sever and remove them, but the writer believes that this distinction is rather seeming than real, for the reason that the courts are strongly inclined to hold that the purpose of nearly every annexation is trade, or the mixed purpose of trade and agriculture, in either of which cases the presumption is that the articles annexed were not intended as permanent accessions to the realty.<sup>20</sup> But where such a finding would be inconsistent, the doctrine of an implied agreement will be often invoked.<sup>21</sup>

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<sup>18</sup> 3 East, 38.

<sup>19</sup> Ewell on Fix. 119.

<sup>20</sup> *Van Ness v. Picard*, 2 Pet. 137.

<sup>21</sup> *Dubois v. Kelley*, 10 Barb. 496; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. Rep. 821.

TRADES UNIONS—INJUNCTION—CONSPIRACY  
AGAINST PERSONS NOT MEMBERS.

## PLANT v. WOODS.

*Supreme Judicial Court of Massachusetts, Sept. 6, 1900.*

The members, agents and servants of a non-incorporated labor union may be restrained from conspiring to compel the members of the complainant union to rejoin the defendant union by such coercion, threats of loss of property by strikes and boycotts, as will induce their employers to get the complainants to ask for reinstatement in the defendant union, or, that failing, to discharge them, where such acts were done intentionally to cause damage to complainants, and actually did cause it.

Holmes, C. J., dissenting.

HAMMOND, J.: This case arises out of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them is that the plaintiff union is affiliated with a national organization having its headquarters in Lafayette, in the State of Indiana, while the defendant union is affiliated with a similar organization having its headquarters in Baltimore, in the State of Maryland. The plaintiff union was composed of workmen who, in 1897, withdrew from the defendant union. There does not appear to be anything illegal in the object of either union, as expressed in its constitution and by-laws. The defendant union is also represented by delegates in the Central Labor Union, which is an organization composed of five delegates from each trades union in the city of Springfield, and had in its constitution a provision for levying a boycott upon a complaint made by any union. The case is before us upon the appeal of the defendants from a final decree in favor of the plaintiffs, based upon the findings stated in the report of the master.

The contest became active early in the fall of 1898. In September of that year the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be non-union men," and voted "to notify bosses" of that declaration. The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs, and each of them, to join the defendant association, peaceably, if possible, but by threat and intimidation if necessary. Accordingly, on October 7th, they voted that, "If our demands are not complied with, all men working in shops where Lafayette people are employed refuse to go to work." The plaintiffs resisting whatever persuasive measures, if any, were used by the defendants, the latter proceeded to carry out their plan in the manner fully set forth in the master's report. Without rehearsing the circumstances in detail, it is sufficient to say here that the general method of operations was substan-

tially as follows: A duly authorized agent of the defendants would visit a shop where one or more of the plaintiffs were at work, and inform the employer of the action of the defendant union with reference to the plaintiffs, and ask him to induce such of the plaintiffs as were in his employ to sign applications for reinstatement in the defendant union. As to the general nature of these interviews the master finds that the defendants have been courteous in manner, have made no threats of personal violence, have referred to the plaintiffs as non-union men, but have not otherwise represented them as men lacking good standing in their craft; that they have not asked that the Lafayette men be discharged, and in some cases have expressly stated that they did not wish to have them discharged, but only that they sign the blanks for reinstatement in the defendant union. The master, however, further finds, from all the circumstances under which those requests were made, that the defendants intended that employers of Lafayette men should fear trouble in their business if they continued to employ such men, and that employers to whom these requests were made were justified in believing that a failure on the part of their employees who were Lafayette men to sign such reinstatement blanks, and a failure on the part of the employers to discharge them for not doing so, would lead to trouble in the business of the employers in the nature of strikes or a boycott; and the employers to whom these requests were made did believe that such results would follow, and did suggest their belief to the defendants, and the defendants did not deny that such results might occur; that the strikes which did occur appear to have been steps taken by the defendants to obtain the discharge of such employees as were Lafayette men who declined to sign application blanks for reinstatement; that these defendants did not in all cases threaten a boycott of the employer's business, but did threaten that the place of business of at least one such employer would be left off from a so-called "fair list" to be published by the Baltimore union. The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette union to join the Baltimore union, and as a means to this end they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business. We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and, to carry out their purpose, have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that

failing, then to discharge them. It matters not that this request to discharge has not been expressly made. There can be no doubt, upon the findings of the master and the facts stated in his report, that the compulsory discharge of the plaintiffs in case of non-compliance with the demands of the defendant union is one of the prominent features of the plan agreed upon. It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may "expect trouble in his business." It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will by strong, persistent, and organized persuasion and social pressure of every description do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practiced by organized labor will be made to injure him in his business, even to his ruin, if possible; and that by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself. However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally, or even answerable civilly in damages to those who suffer, still, with full knowledge of what is to be expected, they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those—whether their employer or fellow workmen—against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realized until all those probable consequences are considered. Such is the nature of the threat, and such the degree of coercion and intimidation involved in it. If the defendants can lawfully perform the acts complained of in the city of Springfield, they can pursue the plaintiffs

all over the State in the same manner, and compel them to abandon their trade, or bow to the behests of their pursuers. It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this as in every other case of equal rights the right of each individual is to be exercised with due regard to the similar right of all others, and the right of one be said to end where that of another begins. The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. Sir William Erle, in his book on Trades Unions (page 12), has stated this in the following language, which has been several times quoted with approval by judges in England: "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition." The same rule is stated with care and discrimination by Wells, J., in *Walker v. Cronin*, 107 Mass. 555: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as the result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract, or otherwise, is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing." In this case the acts complained of were calculated to cause damage to the plaintiffs, and did actually cause such damage; and they were intentionally done for that purpose. Unless, therefore, there was justifiable cause, the acts were malicious and unlawful. *Walker v. Cronin*, *ubi supra*; *Carew v. Rutherford*, 106 Mass. 1, and cases cited therein.

The defendants contend that they have done nothing unlawful, and in support of that contention they say that a person may work for whom he pleases, and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice of his

intention in advance, with or without stating the reason; that what one man may do several men acting in concert may do, and may agree beforehand that they will do and may give notice of the agreement; and that all this may be lawfully done, notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employees, and that such a result was intended. In a general sense, and without reference to exceptions arising out of conflicting public and private interests, all this may be true. It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in (1880) App. Cas. 1, as follows: "An act lawful in itself is not converted, by a bad or malicious motive, into an unlawful act, so as to make the doer of the act liable to a civil action." If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate. In so far as a right is lawful it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor,—as, where one digs upon his own land for water (*Greenleaf v. Francis*, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra v. Bourges*, 141 Mass. 7, 4 N. E. Rep. 623); but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel, and of procuring a wife to leave her husband. *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. Rep. 417, 10 L. R. A. 468, and cases therein cited. Indeed, the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See, on this, an instructive article in 8 Harv. Law Rev. 1, where the subject is considered at some length. It is manifest that not much progress is made by such general statements as those quoted above from *Allen v. Flood*, whatever may be their meaning.

Still standing for solution is the question, under what circumstances, including the motive of the actor, is the act complained of lawful, and to

what extent? In cases somewhat akin to the one at bar this court has had occasion to consider the question how far acts manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause such injury, and partly in reliance upon such coercion, are justifiable. In *Bowen v. Matheson*, 14 Allen, 499, it was held to be lawful for persons engaged in the business of shipping seamen to combine together into a society for the purpose of competing with other persons engaged in the same business, and it was held lawful for them, in pursuance of that purpose, to take men out of a ship if men shipped by a non-member were in that ship to refuse to furnish seamen through a non-member, to notify the public that they had combined against non-members and had "laid the plaintiff on the shelf," to notify the plaintiff's customers and friends that the plaintiff could not ship seamen for them, and to interfere in all these ways with the business of the plaintiff as a shipping agent, and compel him to abandon the same. The justification for these acts so injurious to the business of the plaintiff, and so intimidating in their nature, is to be found in the law of competition. No legal right of the plaintiff was infringed upon, and, as stated by Chapman, J., in giving the opinion of the court (page 503): "If the effect of these acts was to destroy the business of shipping masters who are not members of the association, it is such a result as, in the competition of business, often follows from a course of proceedings that the law permits." The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed in that case, even to the injury of their rivals. Similar decisions have been made in other courts where acts somewhat coercive in their nature and effect have been held justifiable under the law of competition. *Steamship Co. v. McGregor* (1892), App. Cas. 25; *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. Rep. 1119; *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. Rep. 1, 37 L. R. A. 455. On the other hand, it was held in *Carew v. Rutherford*, 106 Mass. 1, that a conspiracy against a mechanic—who is under the necessity of employing workmen in order to carry on his business—to obtain a sum of money from him, which he is under no legal obligation to pay, by inducing his workmen to leave him, or by deterring others from entering into his employ, or by threatening to do this, so that he is induced to pay the money demanded under a reasonable apprehension that he cannot carry on his business without yielding to the demands, is illegal, if not criminal, conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back. Chapman, C. J., speaking for the court, says that "there is no doubt that, if the parties under such circumstances succeed in injuring the business of the mechanic, they are liable to pay all the damages done to him." That case bears a close analogy to the one at bar.

The acts there threatened were like those in this case, and the purpose was, in substance, to force the plaintiff to give his work to the defendants, and to extort from him a fine because he had given some of his work to other persons. Without now indicating to what extent workmen may combine, and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced, or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow workmen, we think this case must be governed by the principles laid down in *Carew v. Rutherford*, *ubi supra*. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. As stated by Lord Bramwell in *Reg. v. Drultt*, 10 Cox, Cr. Cas. 592: "No right of property or capital is so sacred or carefully guarded by the law of the land as that of personal liberty. That liberty is not liberty of the mind only; it is also a liberty of the mind and will; and the liberty of a man's mind and will to say how he should bestow himself, his means, his talent, and his industry is as much a subject of the law's protection as that of his body." It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter against their will to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will. The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them. The necessity that the plaintiffs should join this association is not so great nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiff was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws. The language used by this court in *Carew v. Rutherford*, 106 Mass. 1, may be repeated here with emphasis, as applicable to

this case: "The facts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and, if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both." See, in addition to the authorities above cited, *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Sherry v. Perkins*, 147 Mass. 214, 17 N. E. Rep. 307; *Vegelahn v. Guntner*, 167 Mass. 97, 44 N. E. Rep. 1077, 35 L. R. A. 722; *St. 1894*, ch. 508, § 2; *State v. Donaldson*, 32 N. J. Law, 151; *State v. Stewart*, 59 Vt. 273, 9 Alt. Rep. 559; *State v. Glidden*, 55 Conn. 46, 8 Alt. Rep. 890; *State v. Dyer*, 67 Vt. 690, 32 Atl. Rep. 814; *Lucke v. Assembly*, 77 Md. 396, 26 Atl. Rep. 505, 19 L. R. A. 408. As the plaintiffs have been injured by these acts, and there is reason to believe that the defendants contemplate further proceedings of the same kind, which will be likely still more to injure the plaintiffs, equity lies to enjoin the defendants. *Vegelahn v. Guntner*, *ubi supra*.

Some phases of the labor question have recently been discussed in the very elaborately considered case of *Allen v. Flood*, *ubi supra*. Whether or not the decision made therein is inconsistent with the propositions upon which we base our decision in this case, we are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges, which view, it may be remarked, was entertained not only by three of the nine lords who sat in the case, but also by the great majority of the common-law judges who had occasion officially to express an opinion. There must be, therefore, a decree for the plaintiffs. We think, however, that the clause, "or by causing or attempting to cause any person to discriminate against any employer or members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer," is too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts; and for that reason, and also because, so far as respects unlawful acts, it seems to cover only such acts as are prohibited by other parts of the decree, we think it should be omitted. Inasmuch as the association of the defendants is not a corporation, an injunction cannot be issued against it as such, but only against its members, their agents and servants. As thus modified, in the opinion of the majority of the court, the decree should stand. Decree accordingly.

NOTE.—The timely importance of the decision of the Massachusetts court has led us to select it for publication in full as a leading case. The novelty of the question which it presents is such that the number of precedents on the subject is as yet limited, and these are referred to in the opinion of the court. The character of the dissenting opinion by Holmes, C. J., seems to justify more than a passing notice, and its publication as a note to the case will doubtless be more satisfactory to our readers. "When a ques-

tion," says Holmes, C. J., "has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority, and leave the remedy to the legislature, if that body sees fit to interfere. If the decision in the present case simply had relied upon *Vegelahn v. Guntner*, I should have hesitated to say anything, although I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the house of lords in *Allen v. Flood*. But, much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one, and to open an issue which otherwise I might have thought closed. The difference between my brethren and me now seems to be a difference of degree, and the line of reasoning followed makes it proper for me to explain where the difference lies.

"I agree that the conduct of the defendants is actionable unless justified. *May v. Wood*, 172 Mass. 11, 14, 51 N. E. Rep. 191, and cases cited. I agree that the presence or absence of justification may depend upon the object of their conduct; that is, upon the motive with which they acted. *Vegelahn v. Guntner*, 167 Mass. 92, 105, 106, 44 N. E. Rep. 1077, 35 L. R. A. 732. I agree, for instance, that, if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal. *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. Rep. 619. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined. A sensible workman would not contend that the courts should sanction a combination for the purpose of inflicting or threatening violence, or the infraction of admitted rights. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests.

"I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

"Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there a body capital of which labor, as a whole, secures a larger share by that means.

The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to

consumption by the multitude, and is consumed by the multitude always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.

"It is only by divesting our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption,—asking ourselves what is the annual product, who consumes it, and what changes would or could we make,—that we can keep in the world of realities.

"But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike."

#### JETSAM AND FLOTSAM.

##### DOES THE DOCTOR, DRUGGIST OR PATIENT OWN THE PRESCRIPTION?

To whom does the prescription belong, to the doctor who writes it, the patient who receives and pays for it or the druggist who puts up the medicine? This question has recently been the subject of an interesting discussion in the secular press, having been started by the *New York Times*, in commenting on a letter received from one of its readers complaining that a druggist, who filled a prescription which he had received from a doctor, and paid for, would not return him the prescription. According to the *Times*, the druggist based his claim of ownership in the prescription upon the grounds of frequently being required to produce in court the originals of prescriptions, which he had put up, in order to answer important questions, and further that he needs the prescription for his own protection in the event, if any trouble arises from its taking, to show that he has put up only what the doctor has prescribed. The druggist insists that it not safe for a patient to hold a prescription which he can have filled at any time, for the reason that the physician formulates a prescription according to existing symptoms and the exact condition of the patient at the time, and if he, the patient, should take it at another time when he apparently may have the same trouble, but conditions are different, he will do himself a physical, and the doctor a professional injury. The doctor partially approves the claim of the druggist, modifying it only to the extent of requiring him to give a copy of the prescription to the patient, and declares that no prescription should ever be filled from a copy, which should be so marked, and that no prescription should ever be refilled except upon the approval of the doctor who gave it, and that there should be a law to this effect.

These views of the question wholly ignore any property rights the patient may be supposed to have in the prescription. The patient pays the doctor for writing out the prescription and then pays the druggist for filling it. Now, what is it the patient buys? Is it only what the pharmacist hands him in box, bottle or paper? If so, what is it that he has paid the doctor for? The druggist receives full remuneration for his drugs and compounding, the prescription has cost him nothing, by what right, then, does he hold title to it? For self protection it is claimed. But

what about the patient's right to avail himself of whatever advantages may afterwards adhere in the prescription? The patient having purchased a prescription has a property right therein, which neither the doctor who wrote it, nor the druggist who filled it has, and he is therefore entitled to its possession. The druggist might be permitted to retain a copy.—*Chicago Law Journal*.

#### BOOKS RECEIVED.

- A Brief for the Trial of Civil Issues Before a Jury By Austin Abbott. Second and enlarged edition by the publishers' editorial staff. The Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1900. pp. 616, sheep, price, \$4.50. Review will follow.
- A Selection of Cases on the Law of Insurance. By Edwin H. Woodruff, Professor of Law, Cornell University. New York; Baker, Voorhis & Company, 1900. Buckram; pp. 605; price, \$4.25. Review will follow.

#### WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCORD AND SATISFACTION — Consideration.—An agreement by the plaintiffs in a judgment to apply to the satisfaction thereof certain certificates of indebtedness which they had issued to defendant was void

for want of consideration, the amount of such certificates being much less than the amount of the judgment.—*RUSSELL V. MEEK*, Ky., 58 S. W. Rep. 373.

2. ACCOUNTING—Mortgages.—The court of chancery cannot take cognizance of unliquidated claims, in an accounting, but will permit the parties to go into a court of law and establish their rights, and return to chancery to state the result in the account.—*KNOX V. LLOYD*, N. J., 47 Atl. Rep. 55.

3. ADMINISTRATION—Real Property—Right to Possession.—The tenant of an administratrix claiming homestead and dower in her husband's lands, ordered to be leased for one year, for the benefit of the estate, on her petition filed before the time for presentation of claims has expired, is entitled to possession, as against insolvent heirs who deny the widow's claims.—*EX PARTE BARKER*, Ala., 28 South. Rep. 574.

4. ADMIRALTY — Maritime Liens — Advances and Charges.—No maritime lien exists on a vessel, in the absence of express contract therefor, for advances made to the crew without the knowledge of the master, or for port charges paid, in favor of a charterer for a voyage, whose charter was not with the owner, but with a time charterer, who was bound by his charter to pay all such charges, and of which fact his sub-charterer was charged with notice.—*THE SOLVEIG*, U. S. C. C. of App., Fourth Circuit, 103 Fed. Rep. 322.

5. ADMIRALTY—Shipping—Lien for Freight.—Where the consignee and owner of a cargo fail to pay or tender the freight due on the discharge of the cargo, the carrier, to preserve its lien, is authorized to retain and store sufficient of the cargo to pay such freight, and the expense of storage and loss of use of the commodity must be borne by the owner.—*THE ASIATIC PRINCE*, U. S. D. C., E. D. (N. Y.), 103 Fed. Rep. 676.

6. AGREED STATEMENT OF FACTS.—Where parties agree to a statement of facts to which is attached, as an exhibit, the findings and decision of a referee thereon, made in pursuance of a reference by the parties, and the statement is signed as approved by counsel for both, an objection to the admission of the exhibit in evidence is not tenable, especially as the bill of exceptions shows that the statement was offered by consent.—*DEERING HARV. CO. V. KELLY*, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 261.

7. APPEAL—Parties—Severable Controversy.—When several parties are made defendants to a suit, and the decree as to any one of them is severable, or so separate and distinct as not to affect the rights of the other parties to the suit, such party may prosecute his appeal without joining others whose rights are not so affected.—*GRAND ISLAND, ETC. R. CO. V. SWEENEY*, U. S. C. C. of App., Eighth Circuit, 103 Fed. Rep. 842.

8. ATTORNEY AND CLIENT—Disbarment—Embezzlement.—Where an attorney settles an account upon which a suit is pending, and receives payment on such settlement, and thereafter conceals from his client the fact that the money has been paid and account settled, and continues his prosecution of the case at his client's expense, such act is a deceit practiced upon a party to an action, and is an express ground for disbarment, under section 428, Rev. Codes.—*IN RE SIMPSON*, N. Dak., 83 N. W. Rep. 541.

9. ATTORNEY AND CLIENT—Fees — Evidence—Estoppel.—Where an attorney, who was an heir to an estate, stated that his services therefor were to be without compensation, but the statement was made with the impression that the other heirs were not charging for their services which they afterwards received compensation for, he is not estopped from demanding compensation.—*PICKETT V. GORM*, Tenn., 88 S. W. Rep. 402.

10. BANKRUPTCY—Act of Bankruptcy—Assignment.—The appointment of a receiver by a court of equity for a partnership after its dissolution by the death of a partner, on the application of the administrator of the deceased partner, although not opposed by the surviv-

ing partners, is not "a general assignment for the benefit of creditors" on their part, within the meaning of Bankr. Act 1898, § 8, subd. 4, which makes such assignment an act of bankruptcy. To come within that provision, the action must be voluntary and must constitute a general assignment at common law.—*VACCARO V. SECURITY BANK OF MEMPHIS*, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 436.

11. **BANKRUPTCY—Manufacturing Corporation—Preference.**—A manufacturing corporation, which has permitted three judgments to be taken against it, and executions to be issued thereon, and its property to be advertised for sale thereunder, and which thereafter institutes proceedings for the dissolution of the corporation, is chargeable with having committed an act of bankruptcy, within Bankr. Act § 8, subd. 3, providing that an act of bankruptcy may be committed by suffering or permitting, while insolvent, any creditor to obtain a preference through legal proceedings, and not having vacated or discharged the same at least five days before sale.—*IN RE STROM*, U. S. D. C., E. D. (N. Y.), 103 Fed. Rep. 618.

12. **BANKRUPTCY—Refusal to Confirm Composition.**—Under Bankr. Act 1898, § 25, allowing appeals in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals, "from a judgment granting or denying a discharge," no appeal lies from a refusal of the court of bankruptcy to confirm a composition offered by a bankrupt to his creditors, since no certificate or decree of discharge is either granted or denied in proceedings for the confirmation of a composition, and such appeal is contrary to the general scheme of the act.—*IN RE ADLER*, U. S. D. C., W. D. (Tenn.), 103 Fed. Rep. 444.

13. **BANKS—Loss of Deposit Book—Bond of Indemnity.**—Where a depositor in a savings bank signs a deposit book assenting to the by-laws then in force, and "to those which may be thereafter made pursuant to the power granted in the third article," providing for further by-laws or alterations of those already made, and that "all such by-laws and alterations shall be equally binding on all depositors as those by them subscribed, after the same shall have been duly made known," a by-law adopted after the deposit was made, and not made or attempted to be made known to the depositor, binds neither the depositor, nor any one representing him, nor his estate.—*HUBBON V. ROXBURY INST. FOR SAVINGS*, Mass., 57 N. E. Rep. 1021.

14. **BILLS AND NOTES—Alteration by Payee—Effect.**—When defendant gave plaintiffs his note, and after delivery plaintiffs added the name of another thereto as a co maker, such alteration was a material one, and avoided the note.—*BROWN V. JOHNSON*, Ala., 28 South. Rep. 879.

15. **BILLS AND NOTES—Guaranty—Parties.**—A contract written upon the back of a negotiable promissory note, as follows: "We hereby guaranty the payment within note," and signed by a stranger to the note at the time of its execution, under the law of Massachusetts constitutes a contract of guaranty, and not of indorsement, and is non-negotiable, an action thereon being maintainable only in the name of the payee of the note.—*EDGERLY V. LAWSON*, Mass., 57 N. E. Rep. 1020.

16. **BOND—Indemnity—Suretyship—Forgery.**—Where defendants agreed with the obligor in a bond of indemnity to plaintiff that they would sign the bond as sureties if G signed as a surety, and thereafter the obligor exhibited to defendants a bond to which the signature of G was forged, whereupon defendants signed the bond, and neither defendants nor complainant was aware of the forgery, defendants were not liable, though after default on the bond G made a payment to complainant.—*SOUTHERN COTTON-OIL CO. V. BASS*, Ala., 28 South. Rep. 576.

17. **BUILDING AND LOAN ASSOCIATIONS—Insolvency.**—Where the mortgage given by a borrowing stockholder in a building and loan association secures the

payment of interest and the monthly dues on his stock until his shares reach maturity, and provides that the loan shall then be paid by the cancellation of such shares, which are also assigned to the association as collateral security, there is an implied agreement that all payments made upon the stock shall be applied as credits on the mortgage debt; and upon the maturing of the mortgage by reason of the insolvency of the association, and its foreclosure by a receiver, before the assets and liabilities of the association have been definitely ascertained, the borrower is entitled to credit upon his debt for all payments so made.—*HALE V. BANKER*, Cal., 62 Pac. Rep. 163.

18. **BUILDING AND LOAN ASSOCIATION—Liability to Shareholder.**—A building and loan association issued a certificate of stock, providing that its articles of association, by-laws, terms, and conditions, printed thereon, together with the application, should be construed together as the contract with the shareholder, and that the association assumed "no obligation other than contained in its printed literature." Held, that the shareholder, who relied on printed statements of the association given to him by its agent to induce him to subscribe for stock, had the right to rely thereon, and that the association was bound thereby.—*PETERSON V. PEOPLE'S BLDG., LOAN & SAV. ASSN.*, Mich., 82 N. W. Rep. 607.

19. **CARRIERS—Passengers—Negligence—Burden of Proof.**—Where a freight train, with a caboose attached, in which passengers are seated, separator, and the separated cars collide with such force that a passenger is thrown from his seat and injured, the presumption is that the accident resulted from the company's negligence, and the burden of proof is on the company to establish want of negligence.—*SOUTHERN RY. CO. V. DAWSON*, Va., 36 S. E. Rep. 996.

20. **CONSTITUTIONAL LAW—Franchise of Corporation.**—The taking by a municipal corporation, for the use of the municipality, of a system of waterworks belonging to a private corporation, under an act of the legislature providing that the valuation to be paid therefor should be the "fair value of said property for the purposes of its use by the city," and that "such value shall be estimated without enhancement on account of future earning capacity, or good will, or on account of the franchise of said company," is a taking without just compensation, and is therefore in conflict with the fourteenth amendment to the constitution of the United States, providing that no person shall be deprived of his property without due process of law.—*NEWBURYPORT WATER CO. V. CITY OF NEWBURYPORT*, U. S. C. C., D. (Mass.), 103 Fed. Rep. 564.

21. **CONSTITUTIONAL LAW—License—Farm Produce.**—A law requiring merchants who sell farm produce upon commission to execute a bond, in the penal sum of \$5,000, conditioned for the faithful performance of their contracts, and to pay a license fee is unconstitutional.—*VALENTINE V. BERRIEN CIRCUIT JUDGE*, Mich., 83 N. W. Rep. 594.

22. **CONSTITUTIONAL LAW—Ordinance Regulating Height of Billboards.**—A municipal corporation may lawfully, in the exercise of general police powers delegated to it by its charter, regulate the height of billboards maintained therein, within reasonable limits, and a city ordinance limiting the height of such structures to six feet from the ground or sidewalk is not so clearly unreasonable as to justify a court in holding it void as in violation of constitutional rights of property.—*IN RE WILSHIRE*, U. S. C. C., S. D. (Cal.), 103 Fed. Rep. 620.

23. **CONSTITUTIONAL LAW—Street Improvement—Assessment.**—The provisions of a city charter authorizing the common council of the city to contract for grading and paving its streets, and to assess the expense thereof except that of cross walks and intersections of cross streets, against the abutting property, according to the extent of frontage on the street improved, without any reference to the question of bene-

fits, and providing for notice only by publication in the newspapers of the completion of the assessment roll, and that it will remain in the office of the assessors for inspection, but providing no tribunal having authority to reduce the assessments or to review the amount thereof, except for the purpose of ascertaining if they are mathematically correct, are in conflict with the fourteenth amendment to the constitution of the United States providing that no State shall deprive any person of his property without due process of law.—*PARKER V. CITY OF DETROIT*, U. S. C. C., E. D. (Mich.), 108 Fed. Rep. 357.

24. **CONTRACT—Building Contract—Appraisal by Architect.**—Comp. Laws, § 3882, providing that every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals is void, does not render invalid a provision in a building contract that the amount to be added to or deducted from the contract price on account of any alterations shall be determined by the architect.—*SHIM V. KRAUSE*, 83 Dak., 83 N. W. Rep. 583.

25. **CONTRACT—Parol Evidence—Equity.**—Where an agreement in writing is complete on its face, and purports to contain the entire agreement of the parties, parol proof of another term will not be received, although the written contract may contain nothing on the subject to which the parol proof is directed.—*RUSSELL V. RUSSELL*, N. J., 47 Atl. Rep. 37.

26. **CONTRACT—Place of Contract—Usury.**—Where a contract is made in one State, to be performed in another, the parties may stipulate in good faith for the rate of interest allowed in either; and where they have contracted with reference to the laws of one State, there being no evidence that they intended to evade the usury laws of the other State, the contract must be enforced, where it is not usurious.—*BRITISH & AMERICAN MORTG. CO. V. BATES*, 86 S. Car., 86 S. E. Rep. 917.

27. **CONTRACT—Subscriptions—Performance of Conditions.**—In an action against the receiver of an institution to which subscription notes were executed on certain conditions, not expressed in the notes, to determine their liability to creditors, the subscribers may show the conditions on which such notes were given, and that they were not performed, as such evidence is not contradictory of the notes, but avoids their effect.—*CATT V. OLIVIER*, Va., 36 S. E. Rep. 980.

28. **CONTRACT—What Constitutes—Proposal.**—An instrument in the form of a contract between two parties, signed by one of them and by an agent of the other, with a clause reciting that "this contract shall not be considered as binding upon the first party until approved in writing by" the second party, is only a proposal to contract, submitted by the party of the first part to the party of the second part.—*BARNES CYCLE CO. V. SCHOFIELD*, Ga., 86 S. E. Rep. 965.

29. **CONTRACT TO CONVEY RIGHT OF WAY TO RAILROAD—Construction.**—An agreement in writing by a landowner, in consideration of the advantages to accrue to him from the construction of a projected railroad, and of certain covenants on the part of the grantee, granted and conveyed to the railway company "the full and free right of way, of the width of fifty feet," through his land, on a line previously surveyed, and contained covenants for the execution of a deed, when required by the company, conveying the land in fee simple. The agreement was signed by the grantor alone, was acknowledged by him, and filed for record by the company, and not until after 16 years, when it became apparent that the land was valuable for oil and gas, was any request made for a deed. Held, that a right of way was only intended to be conveyed, and that the railroad company took only an easement in the land.—*LOCKWOOD V. OHIO RIVER R. CO.*, U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 348.

30. **CORPORATIONS—Power of Court to Appoint Re-**

ceiver.—A court is without jurisdiction to appoint a receiver to take possession of the property of a corporation upon a complaint filed by a member or stockholder which does not show that the corporation has been dissolved, or seek its dissolution, and which neither shows its insolvency nor alleges fraud or mismanagement on the part of its officers, but alleges only that its liabilities exceed its assets, and that it has ceased to conduct the business for which it was incorporated.—*MURRAY V. SUPERIOR COURT OF LOS ANGELES COUNTY*, Cal., 62 Pac. Rep. 191.

31. **CORPORATIONS—Rights of Stockholders—Issue of Stock.**—Directors of a corporation which is fully organized and in the active conduct of its business are bound to afford to existing stockholders an opportunity to subscribe for any new issue of shares of its capital stock, in proportion to their holdings, before disposing of such new shares in any other way.—*WAY V. AMERICAN GREASE CO.*, N. J., 47 Atl. Rep. 44.

32. **COUNTIES—Claims against County.**—A claim by the State against a county for taxes collected by it in an unorganized county need not be presented to the county commissioners before commencement of a suit thereon, since such county is a trustee of the funds so received, and as such is amenable to a court of equity, within Laws 1895, ch. 68, § 1, prohibiting suits against counties before the claim is presented to the county commissioners, except in actions where equitable relief is sought.—*STATE V. PENNINGTON COUNTY*, S. Dak., 88 N. W. Rep. 563.

33. **CRIMINAL LAW—Assault with Intent to Rob.**—Under Comp. Laws, § 6492, subjecting to punishment every person who shall be guilty of an assault with intent to commit any felony, except an assault with intent to kill, an information averring that accused unlawfully, with force, did make an assault with intent certain personal property, which was then in possession of a certain person, from the person, and against the will of such person, then and there unlawfully and feloniously, by means and use of force, to steal, take, and carry away, sufficiently charges a public offense.—*STATE V. SHIELDS*, S. Dak., 83 N. W. Rep. 559.

34. **CRIMINAL LAW—Instructions—Homicide.**—An instruction is not erroneous, which, after fully stating the rule as to the weight of evidence of good character, further states, "If, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character."—*PEOPLE V. MITCHELL*, Cal., 62 Pac. Rep. 187.

35. **CRIMINAL LAW—Larceny—Former Jeopardy.**—Defendant in a prosecution for larceny filed a plea of former jeopardy, which averred that he had been previously put on trial for the same offense, and that after the jury had been out for some time the foreman informed the court that, while a verdict had not been reached, he believed that one could be if sufficient time were given, but that the court, without the consent of defendant, discharged the jury. At that time no record of the former trial had been made. Held, that there being no record of the former trial, incontrovertible by parol, and the plea stating facts that, if true, entitled defendant to a discharge, it was error not to submit to the jury the issue raised by the plea.—*KINKEL V. PEOPLE*, Colo., 62 Pac. Rep. 197.

36. **DEATH BY WRONGFUL ACT—Damages.**—In Comp. Laws, § 5499, providing that, "if the life of any person or persons is lost or destroyed by the neglect, carelessness or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants or employees, then the widow, heir, or personal representatives of the deceased shall have the right to sue and recover damages for the loss or destruction of the life aforesaid," the word "heir" must be construed as meaning "child," and the section as a whole to give a cause of action

only in favor of the widow or children of the deceased or for their benefit, and no action can be maintained thereunder to recover for the death of a person who left neither widow nor children.—*LINTZ V. HOLY THERMO MINING CO.*, S. Dak., 83 N. W. Rep. 570.

37. **DEED—Mortgage—Lien.**—Where in an action to quiet title defendants claimed under a deed alleged to be in fact a mortgage, and the court found that the deed was intended as a mortgage, such deed constituted a valid lien on the property, except as to purchasers or incumbrancers without notice, under Comp. Laws, § 4357, providing that a mortgage shall be a lien on the property as against every one claiming under the mortgage, except purchasers or incumbrancers in good faith, without notice; and a person obtaining title through an attachment was not such a purchaser or incumbrancer.—*MURPHY V. PLANKINTON BANK*, S. Dak., 83 N. W. Rep. 575.

38. **DIVORCE—Domicile.**—Where a divorce has been granted to the wife, and unrestricted custody of the minor child of the marriage given her in the decree, her own domicile establishes that of the child.—*IN RE VANDERWARKER'S ESTATE*, Minn., 83 N. W. Rep. 588.

39. **DOWER—Deed—Cancellation.**—A widow is entitled to dower in lands of which her husband was seised during the marriage, unless the lands were bought and paid for by another, and conveyed to him by inadvertence.—*GARDNER V. GARDNER*, Va., 86 S. E. Rep. 985.

40. **ELECTIONS—Electors—Qualifications.**—Where a husband and wife had lived in a town continually for five years, and about two months before the election the husband had taken a contract of a place outside of the town, to which his wife accompanied him, but had not rented his house in the town, but left part of his furniture there, and when his contract was completed, after the election, had returned to the town and occupied his usual residence, he and his wife were qualified electors in the town, since it was evident that the electors had no intention of abandoning their domicile in the town.—*JAIN V. BOSSEN*, Colo., 62 Pac. Rep. 194.

41. **EMINENT DOMAIN—County Ditch—Rights of Property Owner—Compensation.**—Any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation by section 19 of the bill of rights.—*LAKE ERIE & W. R. CO. V. COMMISSIONERS OF HANCOCK CO.*, Ohio, 57 N. E. Rep. 1009.

42. **EMINENT DOMAIN—Public Use—Compensation.**—A partnership, which is the owner of a sawmill, and which, in connection with the business carried on, has constructed a railroad, to be used solely for the purpose of facilitating the operations of the sawmill business, is not engaged in any business in which the public is interested. A railroad owned by such a partnership, and operated in such a way, is in no sense property used for public purposes.—*GARBUTT LUMBER CO. V. GEORGIA & A. RY.*, Ga., 86 S. E. Rep. 942.

43. **EVIDENCE—Judicial Notice—Regulations of Lighthouse Board.**—The courts of admiralty will take judicial notice of the regulations of the lighthouse board, made upon the authority of an act of congress, and prescribing the number and kinds of lights to be placed on the draws of bridges across navigable streams, although they are neither pleaded nor offered in evidence.—*SMITH V. CITY OF SHAKOPEE*, U. S. C. C. of App., Eighth Circuit, 103 Fed. Rep. 240.

44. **EVIDENCE—Privilege of Witnesses—Criminal Prosecution—Bankruptcy Proceedings.**—Under Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, a witness in proceedings before a referee in bankruptcy cannot be compelled to testify to the consideration given for certain bank checks made to the witness by a bankrupt, where he states that his answers might tend to criminate him, and the evident purpose of the

examination is to show that the checks were given for gambling debts, the receipt of which, under the laws of the State, is a criminal offense.—*IN RE FELDSTEIN*, U. S. D. C., S. D. (N. Y.), 103 Fed. Rep. 259.

45. **EXTRADITION—Issues in Proceedings.**—Under Act June 6, 1900, providing for the extradition of persons charged with violation of the criminal laws of any foreign country occupied by or under the control of the United States: "provided, further, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged," it is the sole function of the judge before whom such proceedings are had to determine the question of probable cause upon evidence which is competent under our laws, and it is not his province to enter upon the question whether the accused, if surrendered, will be accorded a fair and impartial trial.—*IN RE NEELY*, U. S. C. C., S. D. (N. Y.), 103 Fed. Rep. 631.

46. **EXTRADITION—Power of Congress to Authorize.**—It is within the power of congress to provide by statute for the extradition of fugitives from the justice of a foreign country without any reciprocal treaty, but as a matter of international comity, and such power is not affected by the character of the criminal procedure in such country, or by the fact that the alleged offender against its laws may be a citizen of the United States.—*IN RE NEELY*, U. S. C. C., S. D. (N. Y.), 103 Fed. Rep. 636.

47. **FEDERAL COURTS—Non-Resident Corporation—Jurisdiction.**—Where the circuit court is without jurisdiction, owing to the non-residence in the district of a corporation defendant, and this fact is apparent from the face of the bill, advantage may be taken of the defect by a motion to vacate a decree entered *pro confesso*.—*ELDRIDGE V. AMER. PALACE CAR CO. OF NEW JERSEY*, U. S. C. C., D. (N. J.), 103 Fed. Rep. 209.

48. **FRAUDULENT CONVEYANCE—Judgment—Costs.**—When the petition alleges fraud in the execution of a note and mortgage, and asks to have them set aside, and the real estate so mortgaged subjected to the judgment of the plaintiff, and the answer is a general denial and an avoidance, to which the reply is a general denial, a finding by the court that the note and mortgage were given for a *bona fide* debt due from the mortgagor to the mortgagee entitled the defendant to a judgment for costs.—*CASE V. JACOBITZ*, Kan., 62 Pac. Rep. 115.

49. **FRAUDULENT CONVEYANCES—Preferences by Debtor.**—As a general rule, a debtor has a right to secure a *bona fide* creditor, and, although such action may serve to prefer one creditor over another, such preferences are not regarded as fraudulent.—*ONTARIO BANK OF TORONTO, CANADA, V. HURST*, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 231.

50. **GARNISHMENT—Failure to Answer.**—When a garnishee fails to answer within the time prescribed, the general rule is that the plaintiff is entitled to have a judgment against the garnishee; but in a case where, within three days after the plaintiff had obtained judgment against the defendant, the garnishee filed an answer denying any indebtedness to the defendant, and set forth therein good and sufficient reasons for not answering in due time, which reasons showed that the garnishee was guilty of no laches, but acted in good faith, and therefore was, in justice and right, entitled to an opportunity to answer, it was error to strike the answer and enter a judgment against the garnishee.—*ATLANTA JOURNAL V. BRUNSWICK PUB. CO.*, Ga., 86 S. E. Rep. 929.

51. **GIFT CAUSA MORTIS—Evidence.**—One who claims title to property by gift *causa mortis* must prove the fact of the gift, and that it had the characteristics of such a donation.—*BUECKER V. CARR*, N. J., 47 Atl. Rep. 34.

52. **GUARDIAN AND WARD—Note of Guardian—Consideration.**—An indebtedness of the guardian of a minor

for money borrowed and used for the benefit of his ward is not a good consideration in law for the execution of a note therefor by his successor in the guardianship.—*WRIGHT v. PERRY*, Cal., 62 Pac. Rep. 176.

53. **HABEAS CORPUS**—Detention of Minor in Military Service.—Upon an application by a parent for a writ of *habeas corpus* for the release of his minor son, who is unlawfully detained in the military service of the United States, the testimony of the petitioner as to the date of the birth of the son is not sufficient to establish the age of the latter, when it is evident that it can be supported, if true, by the usual documentary evidence.—*IN RE CARVER*, U. S. C. C., D. (Me.), 103 Fed. Rep. 624.

54. **HEALTH**—Quarantine Regulations—Violation of Injunction.—The court entered a decree enjoining the enforcement of a quarantine regulation prohibiting Chinese persons from leaving San Francisco without first submitting to inoculation, promulgated in part by defendant, as quarantine officer of the port, under Act March 27, 1890, authorizing the federal government to take measures to prevent the spread of contagious diseases from one State or territory to another; such injunction being based on the ground that the statute did not authorize the federal authorities to quarantine as between points within the same State, and on the further ground that the regulation was unconstitutional, as applying only to persons of a particular race, as a class. Held, that a subsequent enforcement of the regulation, modified to apply to all persons leaving for points without the State, who were required to procure a certificate from the quarantine officer, was not a violation of the injunction.—*WONG WAI v. WILLIAMSON*, U. S. C. C., N. D. (Cal.), 103 Fed. Rep. 384.

55. **HUSBAND AND WIFE**—Bills and Notes.—Where plaintiff loaned money to a married woman, and took as security therefor her notes payable to her husband, and indorsed by him and others, which notes were void, in that they were a contract between a married woman and her husband, plaintiff might elect to treat the notes as a nullity, and maintain an action against the maker's administrator on the original transaction on the common counts in *assumpsit* for money lent or for money had and received.—*NAT. GRANITE BANK v. TYNDALE*, Mass., 57 N. E. Rep. 1022.

56. **INJUNCTION**—Threatening Suits for Infringement of Patent.—A court will not grant an injunction *pendente lite* restraining the defendant from sending circulars to agents and customers of complainant threatening suits for infringement of patents, so long as there remains a reasonable doubt as to the propriety of such course, and where the answer denies all allegations of fraud, malice, and bad faith, and asserts the truth of the matters contained in such circulars, and that they were issued in good faith.—*DAVISON v. NAT. HARROW CO.*, U. S. C. C., N. D. (N. Y.), 103 Fed. Rep. 860.

57. **INJUNCTION**—Trespass—Evidence.—Evidence that defendant, a competing telephone company, sold to those of its patrons using also the plaintiff's telephone, and assisted them in installing, desk telephones, with switches and wires connecting the lines of both companies in such manner as that with one telephone the user could transmit and receive messages through either system at his pleasure, is sufficient to support the granting of a preliminary injunction restraining defendant from installing or maintaining connection with the property of the plaintiff, although the making and using of the connection by the patrons does not in any way benefit the defendant, except as it sells and furnishes material for such purpose.—*PEOPLE'S TELEPHONE & TELEGRAPH CO. v. EAST TENNESSEE TELEPHONE CO.*, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 212.

58. **INJUNCTION**—Violation of City Ordinance.—A court of equity will not, by injunction prevent the institution of a prosecution for the violation of a penal

municipal ordinance; nor will it, upon petition for an injunction of this nature, inquire into the validity of such an ordinance, upon constitutional or other grounds.—*CITY OF BAINBRIDGE v. REYNOLDS*, Ga., 86 S. E. Rep. 985.

59. **INSURANCE**—Employer's Indemnity Bond—Warranty in Application.—A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employee, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree by the statement itself and by the bond shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond.—*RICE v. FIDELITY & DEPOSIT CO. OF MARYLAND*, U. S. C. C. of App., Eighth Circuit, 103 Fed. Rep. 427.

60. **JUDGMENT**—Alimony—Laws of Other States.—A judgment for a sum of money, as for alimony, in gross, rendered by a court of Missouri, is a final judgment, though the statute of Missouri provides that the court, on the application of either party, may make such alteration from time to time as to the allowance of alimony as may be proper, and hence such judgment may be sued on in another State.—*TROWBRIDGE v. SPINNING*, Wash., 62 Pac. Rep. 125.

61. **JUDGMENTS**—Collateral Attack.—A judgment entered on a warrant of attorney cannot be collaterally attacked by junior judgment creditors in a proceeding before a master appointed to distribute the proceeds of real estate on which the judgments were liens.—*WRIGHT v. WRIGHT*, U. S. C. C., W. D. (Penn.), 103 Fed. Rep. 580.

62. **JUDGMENTS**—Lien—Loss of.—Where an action to enforce a judgment lien on real estate, given by Comp. Laws, § 5104, making a judgment a lien on the judgment debtor's real estate which he may have in the county at the time the judgment is docketed, or which he shall acquire thereafter, for 10 years from the time of the docketing, is commenced and brought to issue within such period of 10 years, but not reached for trial until after the expiration thereof, the lien is lost.—*RUTH v. WELLS*, S. Dak., 83 N. W. Rep. 569.

63. **JUDGMENTS**—Payment—Novation.—Where a deed of trust is given to a creditor as collateral for a debt, and the property is afterwards purchased by the creditor at a sale under the trust deed, but is subsequently taken from him under a vendor's lien existing against the property when the trust deed was made, the debtor is not entitled to credit on the judgment for the price which the creditor agreed to pay for such property.—*DEATON GROCERY CO. v. PEPPER*, Va., 86 S. E. Rep. 988.

64. **JUDGMENTS**—Presumption of Validity—Collateral Attack.—The validity of a judgment of a court of general jurisdiction is conclusively presumed, as against collateral attack, unless the record affirmatively shows its invalidity; and it cannot be impeached on the ground that it was without jurisdiction as to certain defendants, because the record fails to show service upon them.—*STEARNS v. WRIGHT*, S. Dak., 83 N. W. Rep. 587.

65. **LANDLORD**—Lien for Supplies.—An agreement by a tenant with a laborer that the latter shall have as compensation for his services all the cotton raised upon a designated field included in the rented premises, the landlord having no knowledge of such agreement, and in no way assenting thereto, cannot, of itself, and without more, operate to defeat his statutory lien for supplies on all the crops produced upon the entire tract of land rented to the tenant. Consequently, where, in such a case, the tenant delivered to the landlord crops raised on such field, and the latter in good faith accepted the same in satisfaction of his lien for supplies, the laborer could not, in an action at law, recover from the landlord the value of such crops.—*BOURNEY v. MATTOX*, Ga., 86 S. E. Rep. 925.

66. **LIFE ESTATES—Power of Life Tenant—Mortgage.**—The life tenant has no power, at the time of the conveyance to him, to so mortgage the land for the purchase price as to bind the interest of the remaindermen, who are in no way parties to such mortgage. —*MCDONALD V. WOODWARD*, 8. Car., 36 S. E. Rep. 918.

67. **LIFE INSURANCE—Mortuary Fund—Garnishment.**—The credits due or to become due a mutual insurance company upon mortuary calls and premiums from persons insured in the association, being a trust fund for the payment of the losses of contributors to it, cannot be diverted by garnishment or an order of court to the payment of the judgment of a mere creditor, who is not a member of the association. —*MUTUAL RESERVE FUND LIFE ASSN. V. PHELPS*, U. S. C. C., D. (Ky.), 103 Fed. Rep. 515.

68. **LIMITATION OF ACTIONS—Amendment.**—A suit is not barred by limitations when the original action is commenced before the time for commencing suit has expired, and an amendment has been filed thereto, unless the amendment sets up a new cause of action. —*BELDEN V. BARKER*, Mich., 88 N. W. Rep. 616.

69. **MANDAMUS—Appeal.**—Where a writ of *mandamus* to compel a grand jury to inquire into a criminal charge is dismissed, and pending an appeal from the order of dismissal the grand jury is discharged, so that it becomes impossible to enforce a judgment against it, if one should be rendered, the appeal will be dismissed. —*STATE V. GRAND JURY OF MULTNOMAH COUNTY*, Oreg., 62 Pac. Rep. 208.

70. **MARRIAGE—Sufficiency of Evidence.**—An agreement to live together as husband and wife, made with the intention of being carried into effect, is not sufficient to constitute a common-law marriage, unless it is acted on by the parties living together as husband and wife. —*LORIMER V. LORIMER*, Mich., 88 N. W. Rep. 609.

71. **MARRIED WOMEN—Separate Estate—Mortgages.**—A married woman executing a mortgage with her husband, which recites that the land conveyed is her separate estate, and that the execution is with the assent of her husband, who is jointly bound, is not entitled to relief from immunity against the sale of the property conveyed, on an allegation that the debt which it was given to secure was not hers, but that of her husband. —*HAMIL V. AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON*, Ala., 18 South. Rep. 558.

72. **MASTER AND SERVANT—Assumption of Risks.**—An employee was injured by a defective valve in a steam pipe. The employer, having been advised of the defect, promised to repair it as soon as his workmen who were absent returned. The repairs were not made, and about 80 days after the promise, such employee was injured. Held, that whether such employee had the right to rely on the promise to repair at the time he was injured was for the jury. —*MANN V. LAKE SHORE & M. S. RY. CO.*, Mich., 88 N. W. Rep. 596.

73. **MASTER AND SERVANT—Injury to Employee—Negligence.**—A railroad company is liable for injuries sustained by one of its servants employed as a boiler maker and repairer of ironwork on locomotives, through the breaking of a running board which the employee was directed by the company's foreman to stand upon for the purpose of making repairs to a locomotive, where the company knew it was in an unsafe condition, and failed to inform the servant thereof. —*ELLIS V. NORTHERN PAC. RY. CO.*, U. S. C. C., D. (Mont.), 103 Fed. Rep. 416.

74. **MORTGAGE—Foreclosure—Limitations.**—A mortgage will be decreed to be foreclosed against the devisee of the mortgagor, although there has been in fact no payment of either principal or interest for over 20 years, when it is shown that the mortgagor and owner of the equity of redemption was also the sole surviving executor of the will of the deceased mortgagee, and the only person who, during the period of defaults in making the payments which came due on the mortgage, could have taken any steps to collect either the

bond or mortgage. —*STIMIS V. STIMIS*, N. J., 47 Atl. Rep. 20.

75. **MORTGAGES—Pleading.**—Rev. St. § 2816, after pointing out in detail the requirements as to validity of a chattel mortgage where the rights of creditors and subsequent purchasers are involved, states: "Provided, that such mortgage, bonds, liens or other instruments intended to operate as a mortgage shall be valid between the parties, anything contained in this chapter to the contrary notwithstanding." Held that, as between mortgagor and mortgagee, the fact that a mortgage was not filed does not affect the validity of the same. —*SCHLESSINGER V. COOK*, Wyo., 62 Pac. Rep. 152.

76. **MUNICIPAL CORPORATIONS—Negligence—Excavation in Street.**—Where plaintiff in an action against a city for injuries sustained by falling into an excavation in a street, at a crossing, knew that the street was being torn up near the crossing, and approached the crossing in the nighttime, when there was sufficient light to have seen the condition of the street, but walked off the sidewalk without looking, the court should have directed a verdict for defendant, since plaintiff was guilty of contributory negligence. —*CLONEY V. CITY OF KALAMAZOO*, Mich., 88 N. W. Rep. 618.

77. **MUNICIPAL CORPORATIONS—Obstruction in Streets—Damages.**—Where an obstruction on a sidewalk has been in existence for such time that the city authorities by exercising ordinary vigilance, would have discovered it in time to prevent an accident to a pedestrian, the city cannot escape liability for want of notice, as failure to discover a dangerous defect in a public street within a reasonable time is itself negligence. —*COWIE V. CITY OF SEATTLE*, Wash., 62 Pac. Rep. 121.

78. **MUNICIPAL CORPORATIONS—Officers.**—Where the treasurer of a city has paid interest coupons in good faith, and turned them over to the city, which still retains them, he is entitled to be credited for the amount so paid in an action by the city against him to recover money alleged to have been collected by him as treasurer and not paid over. —*CITY OF HURON V. MYERS*, S. Dak., 83 N. W. Rep. 553.

79. **MUNICIPAL CORPORATION—Payment of Debts.**—In the absence of an express limitation in the constitution or statutes of Arkansas of the power of cities to draw warrants to an authority to draw them only against a fund appropriated to pay them, or against money in the treasury or against money that will come into the treasury within year after their issue, municipalities of that State, under its constitution and statutes, making municipal warrants receivable in payment of city taxes, have power to issue their warrants to pay just debts when there is no money in their treasuries to pay them, and no prospect that there will be any within a year of their issue. —*CITY OF LITTLE ROCK V. UNITED STATES*, U. S. C. C. of App., Eighth Circuit, 103 Fed. Rep. 418.

80. **MUNICIPAL CORPORATIONS—Street Assessments.**—Under Ky. St. § 2834, providing that no error in the proceedings of the general council shall exempt from payment for the reconstruction of a sidewalk in a city of the first class after the work has been done as required by either the ordinance or contract, the contractor is entitled to payment for his work, when done pursuant to the ordinance or contract, though all the work specified in the ordinance was not included in one contract, and part of it had not been let at all, and two lots on one square were excepted from the contract. —*DUMESNIEL V. LOUISVILLE ARTIFICIAL STONE CO.*, Ky., 58 S. W. Rep. 870.

81. **NEGLIGENCE—Injuries from Contact With Wire—Contributory Negligence.**—The violation of a city ordinance imposing a penalty on dangerous driving cannot preclude a recovery against a telephone company for damages for injury to complainant's horse from contact with a wire suspended in the street, without proof that such driving contributed to the injury. —

**HOVEY V. MICHIGAN TEL. CO.,** Mich., 88 N. W. Rep. 691.

82. **PARTIES—Capacity to Sue—Foreign Trustees.**—A trustee appointed by a court is thereby vested with no authority to maintain an action outside the jurisdiction of his appointment, and such authority will rarely be recognized by a foreign court, in the absence of a statute expressly authorizing it.—**IOWA & CALIFORNIA LAND CO. V. HOAG,** Cal., 62 Pac. Rep. 189.

83. **PARTIES—Joinder of Defendants—Administration of Joint Obligor.**—The administrator of one of several joint contradicting parties cannot be jointly sued with the survivors, either at the common law, or under the statute of Alabama which governs in actions in a federal court sitting in that State.—**UNITED STATES V. BULLARD,** U. S. D. C., S. D. (Ala.), 103 Fed. Rep. 256.

84. **PARTNERSHIP—Actions Between Partners—Accounting.**—An accounting may be had in equity by one partner against the other, without a final winding up and dissolution, in a case where the partnership has, by the agreement, several years to run, and where the partnership articles contemplate a settlement at the end of each season.—**MILLER V. FREEMAN,** Ga., 36 S. E. Rep. 961.

85. **PARTNERSHIP AGREEMENT—Construction—Bill of Discovery.**—A bill by administrators of a deceased partner against the other partners to have the profits of the partnership ascertained for the period between the formation of the partnership and the date of deceased's death, and to have a certain per cent. of the same paid to them, and also praying that defendants be ordered to exhibit the books, etc., of the firm, alleging that the controller of New York threatened to assess and collect a tax on the deceased's interest in the assets of the firm in that State, is multifarious.—**KELLY V. MORRISON,** Mass., 57 N. E. Rep. 1018.

86. **PARTNERSHIP—Surviving Partner—Right to Compensation.**—It was the intention of a father and son, who composed a partnership, that the business of the firm should continue until certain contracts made between the father and the firm were fully performed. These contracts had not been performed at the father's death. The father lived in Pennsylvania, and the son in Michigan, where the business was conducted solely by him, he receiving no compensation except his share of the profits. Held, that the son, as surviving partner was not entitled to compensation for managing the firm business after the father's death.—**PORTER V. LONG,** Mich., 88 N. W. Rep. 691.

87. **PROCESS—Service—Publication.**—Under Code Civ. Proc. § 6102, providing that where the person on whom the service of summons is to be made cannot be found within the State, and that fact appears by affidavit to the satisfaction of the court, such court may grant an order that the service be made by publication, where such person is not a resident of the State, but has property therein, etc., it is not sufficient that it be made to appear satisfactorily to the court that a party has property in this State at the time of the order for publication, but the fact must exist, in order that the court may have jurisdiction of the subject of the action.—**BUNKER V. TAYLOR,** S. Dak., 88 N. W. Rep. 555.

88. **PUBLIC LANDS—Effect of Unauthorized Mining Location.**—The location as an oil placer mining claim of public lands upon which no discovery of oil had been made vests the locators with no rights in such lands as against the United States, or as against one subsequently acquiring the title thereto or rights therein from the United States by any legal means prior to any such discovery.—**OLIVE LAND & DEVELOPMENT CO. V. OLMSTEAD,** U. S. C. C., S. D. (Cal.), 103 Fed. Rep. 568.

89. **RAILROAD COMPANY—Operation of Trains—Statute Requiring Lookout.**—Mill. & V. Code Tenn., §§ 1596-1800, requiring railroad companies to keep the engineer, fireman, or some other person upon the lookout ahead, and, when any person appears upon its road,

to sound the alarm whistle, put on the brakes, and employ every possible means to stop the train, and providing that every railroad company that fails to observe these precautions shall be responsible for all damages resulting from any accident, are not applicable to the operation of trains where, because of the locality or existing conditions, compliance with the statute is impossible, as where engines or cars are going through the process of switching, and cars are necessarily being pushed, instead of being pulled, by the engine.—**TOWLES V. SOUTHERN R. CO.,** U. S. C. C. W. D. (Tenn.), 103 Fed. Rep. 405.

90. **RECEIVERS—Compensation and Expenses.**—Where, at the instance of the plaintiff in an action, a receiver is appointed for property upon which a foreclosure action is then pending, and it is subsequently sold under mortgage, and the receiver is obliged to surrender it to the purchaser, leaving no funds in his possession from which his compensation or expenses can be paid, he is entitled to recover the same from the plaintiff.—**EPHRAIM V. PACIFIC BANK,** Cal., 62 Pac. Rep. 177.

91. **RECEIVERS—Remedies—Proceeding by Petition.**—A proceeding by a receiver to enjoin another from interfering with his possession of property may properly be by petition in the suit in which he was appointed, although the proposed defendant is not a party to such suit, where his rights can be fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion.—**LAKE SHORE & M. S. RY. CO. V. FELTON,** U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 227.

92. **RELEASE AND DISCHARGE—Compromise and Settlement.**—When a debtor pays to a collecting agent a given sum of money upon the express condition that the same is to be accepted by the principal of the latter in full settlement of all demands against the debtor, it is the duty of the creditor, within a reasonable time after being informed of the condition on which the payment was made, to notify the debtor whether or not his offer of settlement is accepted, and, if not, to return to him the money received. What in a given case, would be a reasonable time, depends upon all the facts and circumstances thereof.—**JENKINS V. NATIONAL MUT. BUILDING & LOAN ASSN. OF NEW YORK,** Ga., 36 S. E. Rep. 945.

93. **REMOVAL OF CAUSES—Action by Assignee of Contract.**—Where an action is brought in a State court upon a policy of insurance by one purporting to be the assignee of the party to whom the policy issued, but who the complaint shows was originally a principal party to the contract, and is the person to whom the defendant promised indemnity, so that the assignment was a useless formality, it is not necessary that a petition for removal of the cause to the circuit court of the United States show that the assignor of the cause of action sued upon is a citizen of a different State from that of the defendant.—**HOGG V. CANTON INS. OFFICE OF HONG KONG,** U. S. C. C., D. (Wash.), 103 Fed. Rep. 513.

94. **REMOVAL OF CAUSES—Jurisdiction Erroneously Entertained.**—Where a cause is erroneously removed from a State court to the circuit court of the United States on the ground that there is a separable controversy as to one of the defendants, a receiver is appointed, and the case there proceeds to judgment, and certain property in controversy is directed to be sold, but on appeal it is discovered that there is a defect of jurisdiction, in that the matter in controversy between complainant and the petitioner for removal is a cause of action jointly against the latter and other defendants, and the decree is reversed, with directions to the circuit court to remand the cause, the latter court is without jurisdiction to confirm a sale made by the receiver under the order of the court directing it.—**COLUMB V. HILL,** U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 540.

95. **REPLEVIN—Trial.**—Where an owner of two separate stocks of goods transfers them to defendant, who enters into a tripartite agreement between himself, the former owner, and plaintiff to rescind the sale, and return the goods to the former owner, in order that he may transfer them to plaintiff in discharge of an indebtedness, and the agreement on behalf of plaintiff is fully performed, but defendant, after accepting the consideration for the transfer, refuses to surrender possession of one of the lots of such goods to plaintiff, he may maintain replevin therefor.—*DR. ST. AUBIN V. FIELD*, Colo., 62 Pac. Rep. 199.

96. **REPLEVIN—Possession by Agent.**—While, at common law and by statute in this State, "mere possession of a chattel will give a right of action for any interference therewith," such possession must be in the plaintiff's own right, and not as agent of another. (a) The above rule is not contravened by section 8038 of the Civil Code. The word "agent," as used therein, is to be construed as meaning an agent who has a property, either general or special, in the personality in his possession.—*MITCHELL V. GEORGIA & A. RY. CO.*, Ga., 86 S. E. Rep. 971.

97. **RES JUDICATA.**—The plaintiff, claiming to be the owner of land which had been levied upon under an order of attachment in an action to which he was not a party, filed a motion to discharge the order of attachment, and, his motion having been overruled, thereafter, and after judgment had been rendered in the original action sustaining the attachment, and ordering the land to be sold to satisfy such judgment, instituted a suit to quiet his title to the said land. Held, that the decision on the plaintiff's motion to discharge the attachment was not a final adjudication of his rights in the premises, and not a bar to the action to quiet title.—*FIRST NAT. BANK OF BUCHANAN CO., MO., v. LINVILL*, Kan., 62 Pac. Rep. 165.

98. **RES JUDICATA**—Pendency of Proceedings for Review.—A judgment of the supreme court of a State cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the Supreme Court of the United States by a writ of error, and is there pending and undetermined.—*EASTERN BLDG. & LOAN ASSN. OF SYRACUSE, N. Y., v. WELLING*, U. S. C. C., D. (S. Car.), 103 Fed. Rep. 352.

99. **RIPARIAN OWNER—Ordinary Flow of Water.**—The right of a riparian proprietor on a non-navigable stream to the use of its ordinary flow of water, undiminished by an unreasonable use by a proprietor above him, is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself.—*PINE V. MAYOR*, U. S. C. C., S. D. (N. Y.), 103 Fed. Rep. 337.

100. **SALES—Insanity of Purchaser.**—Where a vendee of merchandise was insane at the time of giving notes and trust deeds to secure the price, an offer to return the property was not a condition precedent to a right to avoid the deed.—*BATES V. HYMAN*, Miss., 25 South. Rep. 567.

101. **STATE BOUNDARIES—Line Between North Carolina and Tennessee.**—It was the evident intention of the North Carolina cession act of 1789, by which Tennessee was ceded to the United States, to make the crest of the great mountain ranges extending across the State in a southwesterly direction the boundary of the ceded territory, and such intention must be given effect in determining the boundary from the cession act and the acts confirming its survey and location in 1821 by the joint commission, which was authorized to settle, run, and re-mark the line "agreeably to the true intent and meaning" of the act of cession.—*BELDING V. HEBARD*, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 632.

102. **TAXATION—Liability of Half-Breeds to State Laws.**—One born of a white father and an Indian mother, and who is a recognized member of the tribe

of Indians to which his mother belongs, is an Indian, and not subject to taxation under the laws of the State in which he resides.—*UNITED STATES V. HIGGINS*, U. S. C. C., D. (Mont.), 103 Fed. Rep. 318.

103. **TAXATION—Municipal Improvements—Bonds.**—Where a municipal corporation levied taxes on all the taxable property of the city for the purpose of paving one of the streets in the business portion of the city, the tax was not invalid, since, the improvement inuring to the convenience of all citizens, it was proper that it should be a common charge on all.—*MAYBIN V. CITY OF BILOXI*, Miss., 25 South. Rep. 566.

104. **TRADE MARKS AND TRADE-NAMES—Injuries from Infringement.**—A manufacturer operating under the style of the "Perfection Mattress Company," and producing a mattress well known to the trade as the "Perfection Mattress," after he has sold out such business may be restrained from carrying on a rival business manufacturing mattresses exactly similar to the Perfection mattress under the label of "Kyle Perfection Mattress," though such mattress was not protected by patent; since his purchaser had a right to the exclusive use of the term "Perfection Mattress," both as a trade-mark and under the sale of the good will of the Perfection Mattress Company.—*KYLE V. PERFECTION MATTRESS CO.*, Ala., 25 South. Rep. 545.

105. **TRADE-NAMES**—Unfair Competition.—The only basis for a private suit for an injunction against unfair competition is the injury to the property rights of the complainant. The fact that the defendant deceives the public as to his goods by fraudulent means, while an important factor in such a suit, does not give a right of action unless it results in the sale of such goods as those of the complainant.—*AMER. WASH. BOARD CO. V. SAGINAW MFG. CO.*, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 261.

106. **TRUSTS—Construction of Deed.**—A mining deed in the ordinary form conveyed mining property to one described as "trustee," and to his "heirs, successors, and assigns, forever." There was also a verbal understanding between the parties that the grantee might sell the property, and pay the proceeds to the grantor. Held, that the mere addition of the word "trustee" to the name of the grantee did not create a trust, or charge a bona fide purchaser for value from him with notice of any trust or claim in favor of the original grantor, so as to render him an involuntary trustee.—*ROA V. WATSON*, S. Dak., 83 N. W. Rep. 572.

107. **UNITED STATES—Negligence in Operating Elevator.**—While the license extended by the United States to the public to use its passenger elevator in a post-office building imposes upon the government the duty to use ordinary care to see that the facilities offered to its licensees are in a condition of reasonable safety, no implied contract arises from such relation to carry the passenger to his destination, which will entitle one who is injured through the incompetence of a person in charge of the elevator to maintain an action against the United States for damages, under Act March 3, 1897 (34 Stat. 563), permitting a recovery against the United States for claims founded upon any contract, express or implied, with the government of the United States, or for damages, in cases not sounding in tort.—*BIGBY V. UNITED STATES*, U. S. C. C., E. D. (N. Y.), 103 Fed. Rep. 595.

108. **WILLS—Remainders—Accounting.**—A will gave a life estate to testator's wife with remainder for life to certain other persons who should be alive at the death of his wife; remainder in favor of such persons' heirs. It was further provided that, if such third persons should die before testator's wife, their children should take the interest of the deceased parent. Held, that the children of the persons given the life estate in remainder, who were living at the time of the death of the testator and his wife, took vested remainders in the property, subject to open and let in children subsequently born.—*TINDAL V. NEAL*, S. Car., 86 S. E. Rep. 1004.